



Kigunyu (Suing as the Legal Representative of the Estate of Magunyu Mugo Deceased) & 3 others v Kaiga (Suing as the Legal Representative of the Estate of Pithon Kaiga Mugo) & another (Environment & Land Case E012 of 2022) [2023] KEELC 16281 (KLR) (16 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16281 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E012 OF 2022**

LN GACHERU, J

MARCH 16, 2023

BETWEEN

PHERISINA NYAMBURA KIGUNYU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MAGUNYU MUGO DECEASED) 1ST PLAINTIFF
ESTATE OF MAGUNYU MUGO (DECEASED) 2ND PLAINTIFF
CAROLINE WAITHIRA MBAA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MBAA MUGO DECEASED) 3RD PLAINTIFF
ESTATE OF MBAA MUGO (DECEASED) 4TH PLAINTIFF

AND

MARY WANJIKU KAIGA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PITHON KAIGA MUGO) 1ST DEFENDANT
ESTATE OF PITHON KAIGA MUGO 2ND DEFENDANT

JUDGMENT

1. The 1st Plaintiff is the Legal Representative and Administrator of the Estate of the late Magunyu Mugo(deceased), having been issued with Limited Grant Ad Litem on 25th January 2022. The 2nd Plaintiff is the Legal Representative of the Estate of Mbaa Mugo(deceased) having been issued with Limited Grant Ad Litem on 1st April 2021, and the Defendant is the Legal Representative to the Estate of Pithon Kaiga Mugo (deceased) having been issued with Limited Grant Ad Litem on 25th January 2022.



2. Vide a Plaint dated 25th April 2022, the Plaintiffs sought for Judgement against the Defendant for the following orders:
 - a. A declaration that land parcel no. Loc.13/Gitugi/658 measuring 2.3 acres, registered in the names of PITHON KAIGA MUGO (deceased) is encumbered by a trust in favour of the Plaintiffs and beneficiaries as dependants of Magunyu Mugo (deceased) and Mbaa Mugo(deceased);
 - b. An orders do issue for the dissolution of trust binding and subsisting on land parcel no. Loc.13/Gitugi/658, and the said land be shared as follows:
 - i. Pherisina Kigunyu the widow of Magunyu Mugo (deceased) to get 0.766 acres as sole proprietor;
 - ii. Caroline Mbaa, the daughter of Mbaa Mugo to get 0/766 acres to hold in trust for herself and her siblings;
 - iii. Mary Wanjiku Kaiga, the widow of Pithon Kaiga Mugo (deceased) to get 0.766 acres as sole proprietor.
 - c. That the honourable Court be please to issue an orders directing and authorising the Deputy Registrar of the court to execute all the requisite land transfer documents and forms to facilitate the sub-division and transfer of the suit land as above;
 - d. That the honourable Court be pleased to issue a further order and/or directions it may deem fit, expedite, necessary meet and just circumstances of this case; and
 - e. Costs.
3. It is the Plaintiffs' case that land parcel no.Loc.13/Gitugi/658 (the suit property), is registered in the name of Pithon Kaiga Mugo (deceased), the late husband of the Defendant and that Pithon Kaiga Mugo (deceased) held the land in trust for himself and his two brothers Magunyu Mugo (deceased) and Mbaa Mugo (deceased) respectively. That the said brothers and their families lived on and equally developed the suit property with permanent houses and farm crops.
4. The Plaintiffs further contend that following the death of Pithon Kaiga Mugo on 6th March 1997, his widow has been in possession of the suit property to date, despite the land being ancestral land. They prayed that the suit property be shared equally among the three families. Further, that the Defendant has refused to proceed with the Succession Cause of her late husband's estate, thereby delaying the sub-division and transfer of the suit property to the Plaintiffs and their families despite several demands.
5. Summons to Enter Appearance accompanied by the Plaint and supporting documents were served upon the Defendant as per the Affidavit of Service Sworn by Julius Thiong'o Muchoki on 8th June 2022, a Process Server. However, the Defendant did not Enter Appearance and no Defence was forthcoming. This prompted the Plaintiffs to file a request for judgement dated 19th July 2022,before the matter proceeded for formal proof hearing.

Plaintiff's case

6. PW1,Pherisna Nyambura Kigunyu, adopted her Witness Statement dated 25thApril 2022, as part of her evidence. She testified that she is a peasant farmer residing on the suit property. She prayed that that court allow her claim for a portion of the suit property that was supposed to be for her deceased husband. She stated that the suit property was currently in the name of her brother-in-law Pithon



Kaiga Mugo (deceased), who was holding the property in trust for his two brothers. She further prayed that the suit property be divided into three portions for each of the brothers.

7. PW2, Caroline Waithira Mbaa, adopted her witness statement as part of her evidence. PW2 testified that she resides on the suit property. She stated that she sued the Defendant because the Defendant had refused to file a succession cause for the estate of her late husband Pithon Kaiga Mugo, who was holding the suit property in trust for his family. Lastly, she testified that the suit property initially belong to their grandfather.
8. Thereafter the Plaintiffs filed written submissions on 10th November 2022, in support of their claim through the Law Firm of L.M. Kinuthia & Associates Advocates. The Plaintiffs identified six key issues in their submissions.
9. On the issue of who was the registered owner of the suit property, the Plaintiffs submitted that Pithon Kaiga Mugo (deceased), was registered as the owner of the suit property on 2nd July 1963, to hold it in trust for himself and his two brothers. The Plaintiffs further submitted that 1st Plaintiff is the sister in law to Pithon Kaiga Mugo (deceased), and a widow of Magunyu Mugo, whereas the 2nd Plaintiff is the daughter to Mbaa Mugo(deceased). They further submitted that they have lived on the suit property together with their families, all through.
10. On the issue of whether the suit property is ancestral land, the Plaintiffs submitted that the suit property was ancestral land according to traditions and customs of the families. Further, that the three brothers lived on the said property and were buried in their respective portions of land within the suit property.
11. The Plaintiffs further submitted that the land was registered in the name of Pithon Kaiga Mugo to hold it in trust for himself and his two brothers in accordance with the wishes of the original owner. They further submitted that following the demise of the registered owner, the trust ought to be dissolved and the suit property equally shared. Lastly they submitted that the Defendant has refused to complete succession proceedings against her late husband's estate to enable the suit property be divided, equally among the three brothers who are now deceased.
12. The Plaintiffs relied on Section 28(b) of the Land Registration Act which provides for overriding interest in registered land. It states:

Overriding interests.

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) deleted by Act No. 28 of 2016, s. 11a.
- (b) trusts including customary trusts;

13. They further relied on the case *Isack Kieba M'Inanga v. Isaaya Theuri M'Lintari & Another* SCoK No. 10 of 2015, wherein the Supreme Court held:

“Each case has to be determined on its own merit and quality of evidence. some of the elements that would qualify a claimant as a trustee are:

- a. The land in question was before fixed registration was family, clan, or group land;



- b. The Claimant belonged to such family, clan, or group;
 - c. The relationship of the claimant to such family, clan, or group was not so remote or tenuous as to make his/her claim idle or adventurous;
 - d. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;
 - e. The claim was directed against the registered proprietor who was a member of the family, clan, or group.”
14. They further relied on the case of *Peter Gitonga v. Francis Maingi M’Ikiara* HCCC No. 146 of 2000, wherein it was stated that a trust can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. Muli J was quoted as saying:
- “Registration of titles are creation of law and one must look into the considerations surrounding the registration of titles to determine whether a trust was envisaged.”
15. This Court has considered the pleadings, witness statements, the submissions and the authorities cited by parties and affirm that the issues raised therein touch on whether the Plaintiffs have proven that late Pithon Kaiga Mugo(deceased), held the suit property in trust for Magunyu Mugo(deceased) and Mbaa Mugo (deceased)?
16. It is not in dispute that Pithon Kaiga Mugo (deceased), is the registered owner of the suit property as per the annexed certificate of search for the suit property. The claim herein is filed by the Plaintiffs as the Legal Representatives of Magunyu Mugo (deceased) and Mbaa Mugo (deceased), the two brothers of Pithon Kaiga Mugo(deceased).The claim is against the estate of Pithon Kaiga Mugo(deceased), who lived and was buried on the suit property. The Plaintiffs prayed that the Court do declared that the suit property was held in trust by Pithon Kaiga Mugo(deceased), for himself and his two brothers. The Plaintiffs produced Letters of Administration to enable them to file this suit on behalf of the estates of Magunyu Mugo(deceased) and Mbaa Mugo (deceased). Therefore, the Plaintiffs herein have capacity to file the suit herein.
17. The main issue for determination is whether Pithon Kaiga Mugo(deceased), held the suit property on behalf of his two brothers.
18. The Plaintiffs relied on the case of *Isack Kieba M’Inanga v. Isaaya Theuri M’Lintari & Another* SCoK No. 10 of 2015, wherein the Court listed instances where customary trusts arose, including where the land in question was before fixed registration was family, clan, or group land; and where the Claimant belonged to such family, clan, or group.
19. The Plaintiffs’ claim is that Pithon Kaiga Mugo (deceased), held the suit property in trust for himself and his two brothers. The present suit therefore seeks a declaration that the Pithon Kaiga Mugo’s (deceased) held the suit property in trust for his brothers, that the trust be dissolved and the suit property be distributed equally among the respective estates of the deceased brothers.



20. There was no Defence filed by the Defendant. However, even in uncontroverted evidence, the Plaintiffs had a duty to call evidence and prove their case on the required standard of balance of probabilities. See the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, where the Court held as follows;

“The hearing referred to above is the one commonly known as “Formal proof”. The Civil Procedure Rules do not define “Formal Proof”. Black’s Law Dictionary defines “Formal” as including “rules established by an institution according to certain processes”. This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

21. The provisions for customary trusts are provided for under Section 28(b) of the Land Registration Act which provides as follows:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— trusts including customary trusts.”

22. In the case of *Salesio M’Itonga Vs M’Ithara & 3 Others* (2015) EKLR the Court of Appeal stated that trust is a question of fact and has to be proved by evidence. The Plaintiffs called evidence and stated that the three families have lived on the suit property and each cultivated distinct portion of land. That the deceased brothers were each buried on their distinct portion of land, and their families still live and cultivate the said distinct portions of land. That evidence was not controverted.

23. In this case the Plaintiffs’ led evidence that the suit property was where the late husband to the 1st Plaintiff and the late father to the 2nd Plaintiff were buried. They further submitted that Magunyu Mugo (deceased) and Mbaa Mugo(deceased) used and developed their portions of the suit property. The Plaintiffs claims that a customary trust exists for this reasons and that the suit property is both ancestral and trust land. The Court finds no reasons to doubt the claim.

24. The Supreme Court had this to say in relation to subsistence of customary trusts which the Court will rely on:

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan, or group land;
2. The claimant belongs to such family, clan, or group;
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.;
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances;



5. The claim is directed against the registered proprietor who is a member of the family, clan, or group.

We also declare that rights of a person in possession or actual occupation under Section 30(g) of the Registered Land Act, are customary rights. This statement of legal principle, therefore, reverses the age old pronouncements to the contrary in Obiero v. Opiyo and Esiroyo v. Esiroyo. Once it is concluded that such rights subsist, a court need not fall back upon a customary trust to accord them legal sanctity, since they are already recognized by statute as overriding interests.”

25. The 2nd Plaintiff during the formal proof hearing testified that the suit property initially belonged to their grandfather before Pithon Kaiga Mugo(deceased),came to hold the property in trust for himself and his two brothers. The Plaintiffs further stated that the three brothers lived in their respective equal portions, each extensively developed as individual parcels by the brothers where their respective families lived and still live and cultivate todate.
26. The Defendant did not file a Defence nor a response to the suit, hence the Plaintiffs’ evidence remained uncontroverted, but the Plaintiffs have called sufficient evidence to proof their claim.
27. Having carefully considered the available evidence and the exhibits thereto and the Written Submissions, this Court concurs with the Plaintiffs who sued the Defendant in their respective capacities as the Legal Administrators of the Estate of Magunyu Mugo(deceased),and Mbaa Mugo (deceased),respectively and who have on a balance of probabilities proved their case against the Defendant herein.
28. Consequently, the Court proceeds to enter judgment as per the Plaintiffs’ prayers in the Plaint.
29. The Plaintiffs having proved their case on the required standard, the Court proceeds to declared that land parcel no. Loc.13/Gitugi/658, registered in the names of Pithon Kaiga Mugo (deceased), is encumbered by a trust in favour of the Plaintiffs and their beneficiaries as dependants of Magunyu Mugo (deceased) and Mbaa Mugo(deceased). The said trust should not be dissolved so that each of the three brothers (deceased’s) herein should have their respective portions of land. The three brothers are deceased, but are represented by the parties herein. Consequently, Judgement is entered for the Plaintiffs against the Defendant herein in terms of prayers No (a), (b) & (c)of the Plaint dated 25th April 2022. The Plaintiffs are also entitled to costs and interest thereof.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 16TH DAY OF MARCH 2023.

L. GACHERU

JUDGE

16/3/2023

Delivered virtually in the presence of;

Joel Njonjo/Mwende - Court Assistant

1st Plaintiff – Absent

though aware of the Judgment date.



2nd Plaintiff - Absent

Defendant – Absent

